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March 20, 2000

Thomas C. Power
Senior Legal Advisor
Office of the Chairman
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
8-B201
Washington, D.C. 20554

Re: Class A Low Power Television
MM Docket No. 99-292
EX PARTE PRESENTATION

Dear Mr. Power:

On behalf of USA Broadcasting, Inc. ("USAB"), this letter follows up on the issues that you raised with Julius Genachowski and me at our meeting on March 16. At our meeting, we described USAB's position as both a full-power and low-power television licensee: fully protect full-power stations, including DTV maximization, and then permit any LPTV station that contributes to diversity to qualify for Class A status. LPTV stations that were in existence prior to passage of the Act, but that were not offering locally produced programming, should be eligible for Class A status under the "public interest determination" eligibility criterion set forth in the statute. It would be patently unfair for the Commission to deny Class A status to low power television stations that were not airing locally produced programming prior to passage of the Act. Facing the threat of imminent displacement from DTV operations, LPTV stations have had no incentive to add a local programming capability. In fact, many have been expending full efforts to stay on the air. For example, of USAB's 26 LPTV stations, 20 faced displacement from digital operations. For the Commission to adopt backward-looking rules that impose a local origination requirement as of a certain period in 1999 would be fundamentally unfair in light of the uncertainties faced by these stations. It would be unfair to USAB from another perspective: USAB is in the process of converting its full-power and low-power stations from electronic retail outlets to fully

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programmed stations, starting with its full-power stations. For the FCC to tell USAB at this point that, in retrospect, it will be effectively penalized for transitioning its full-power stations first obviously would disserve the interest of diversity.

USAB is concerned that any interpretation that limits the FCC's ability to use its discretion to make a "public interest determination" under the Community Broadcasters Protection Act of 1999 could have far-reaching consequences in other areas.

On November 29, 1999, Congress enacted the Community Broadcasters Protection Act of 1999 ("CBPA"). 1/ The CBPA requires the Commission establish a Class A television service and make licenses available to qualifying low-power television ("LPTV") stations. The regulations for Class A service are to be created within 120 days after the date of enactment.

The CBPA provides for two avenues by which an LPTV station may qualify for Class A status. First, the CBPA established a series of criteria that a station can meet in order to ensure eligibility. 2/ Alternatively, Section (f)(2)(B) of the CBPA permits the Commission to allow other LPTV stations to qualify for Class A status if "the Commission determines that the public interest, convenience, and necessity would be served by treating the station as a qualifying low-power television station for purposes of this section, or for other reasons determined by the Commission." 3/

1/ Community Broadcasters Protection Act of 1999, Section 5008 of Pub. L. No. 106-113, 113 Stat. 1501 (1999), Appendix I, codified at 36 47 U.S.C. Sec. 336(f). The CBPA was enacted as part of the Intellectual Property and Communications Omnibus Reform Act of 1999.

2/ If, during the 90 days preceding the date of enactment of the statute: (1) the station broadcast a minimum of 18 hours per day; (2) the station broadcast an average of at least 3 hours per week of programming produced within the market area served by the station, or the market area served by a group of commonly controlled low-power stations that carry common local programming produced within the market area served by such group; (3) the station was in compliance with the Commission's requirements for LPTV stations; and (4) from and after the date of its application for a Class A license, the station is in compliance with the Commission's operating rules for full-power television stations. 47 U.S.C. Sec. 336(f)(2)(A).

3/ 47 U.S.C. Sec. 336(f)(2)(B).

As in other sections of the Communications Act of 1934, as amended (the "Act"), Congress gave the FCC broad discretion to determine which stations are eligible for Class A status. So long as the Commission determines that the public interest would be served by its actions, the Commission is free to permit LPTV stations to qualify for a wide range of reasons. Since the public interest would be served by opening Class A service to a large number of LPTV stations, the Commission should use its authority to broadly confer Class A status to LPTV stations that contribute to diversity.

The phrase "public interest" appears more than 100 times in the Communications Act of 1934, as amended. In many of these sections, the phrase is used to signal the Commission that Congress has granted it broad authority to use its judgement to regulate in the interest of the public. As examples, the Commission has been given authority to determine whether new technologies are in the public interest (47 USC § 157(b)), to determine the factors that will govern the calculation used for annual regulatory fees (47 USC § 159(b)(1)(A)), to determine which regulations are no longer necessary and repeal those sections (47 USC § 161), to create such rules and regulations as it deems necessary to carry out the provisions the Communications Act (47 USC § 201(b)), to examine transactions entered into by common carriers relating to services, equipment, and such, and to declare any such transactions void or to permit such transactions to be carried out subject to such modification of their terms and conditions as the Commission deems desirable (47 USC § 215), to make regulations governing the interference of devices capable of emitting radio frequency energy and establishing minimum performance standards for home electronic equipment to reduce their susceptibility to interference from radio frequency energy (47 USC § 302), to study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio, (47 USC § 303), to determine whether a broadcast license should be renewed (47 USC § 307, 309), to design methodologies for use in competitive bidding (47 USC § 309), to determine whether a broadcast license should be transferred or assigned (47 USC § 310), and to prescribe regulations to promote DTV service (47 USC § 336).

In each cited example, Congress has given the Commission leeway to craft regulations that it determines serve the public interest. Accordingly, the Commission has traditionally interpreted its public interest standard broadly. 4/ In reviewing the Commission's use of its authority under the "public interest" standard, the courts have also interpreted the Commission's authority under the "public interest" standard broadly. For example, the Supreme Court has said that "[i]n the context of the developing problems to which it was directed, the Act gave the Commission . . . expansive powers. It was given a comprehensive mandate to encourage larger and more effective use of radio in the public interest . . . ." *National Broadcasting Company v U.S.*, 319 U.S. 190, 219 (1943). Justice Frankfurter said of the "public interest" standard that it "no doubt leaves wide discretion and calls for imaginative interpretation. Not a standard that lends itself to application with exactitude, it expresses a policy, born of years of unhappy trial and error . . . ." *FCC v. RCA*, 346 U.S. 86, 88 (1953). In a very recent decision the Court continued this long tradition of broadly interpreting the public interest standard when it examined Section 210(b) of the Act, 47 USC 201(b), which states that "[t]he Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." *AT&T Corporation v. Iowa Utilities Board,* 525 U.S. 366 (1999).

To decide to interpret the "public interest" standard in the CBPA narrowly could have adverse consequences for the Commission. First, to narrowly construe the

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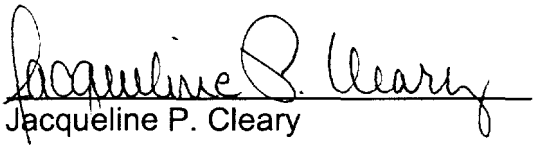
4/ *Amendment of the Commission's Rules Regarding Multiple Address Systems*, FCC 99-415, WT Docket No. 97-81 (January 19, 2000) ("Section 309(j)(6)(E) has been construed to give the Commission broad authority to create or avoid mutual exclusivity in licensing, based on the Commission's assessment of the public interest."); *Federal-State Joint Board on Universal Service, Report to Congress*, 13 FCC Rcd 11501, 11 CR 1312, FCC 98-67, (April 10, 1998) ("Section 254(d) requires the Commission to consider the public interest when determining which providers of interstate telecommunications should contribute to universal service. . . . Congress intended that section 254(d) would be broadly construed."); *Tariff Filing Requirements for Interstate Common Carriers, Report And Order,* 71 RR 2d 898, 7 FCC Rcd 8072 (November 25, 1992) ("We agree with those parties that assert that without specific limitations upon the Commission's authority, Congress intended for the FCC to have broad powers that could be exercised as the public interest requires."); *Virginia Communications, Inc., Memorandum Opinion And Order*, 62 RR 2d 1001, 2 FCC Rcd 1895, at n. 24 (March 31, 1987) ("Section 303(r) of the Act gives us broad authority effectively to execute our statutorily mandated licensing function to ensure that a radio authorization will serve the public interest concerns prescribed by the Act.")

term in this case when it has been broadly interpreted in virtually all analogous uses of the term would open the Commission to the claim that its decision is arbitrary and capricious. Second, and more importantly, such a decision could undermine the Commission's justification for the numerous rules already in place that are based on "public interest" statutory grants of authority, and limit the ability of the Commission to promulgate other rules in the future.

There is no statutory basis to treat the public interest determination in the CBPA differently from other areas where the FCC has been delegated broad authority by Congress to administer public interest determinations. For the reasons set forth above, USAB urges the Commission to assume broad discretion to award Class A status, consistent with its broad discretion in the many other contexts where the Act calls for a "public interest" determination.

Respectfully submitted,

HOGAN & HARTSON LLP

By: 
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JPC/